IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
Criminal Application no. 2266 of 2007

Vijay Laxman Chougule ..Applicant
V/s.
State of Maharashtra ..Respondent.

With
Criminal Application No. 2267 of 2007

Tanaji Dharamraj Patil & ors. Applicant
Vs.
State of Maharashtra Respondent

Mr.A.P. Mundargi, senior counsel with Mr. Ganesh Gole for Applicants in both matters
Mr.Majid Menon i/b. Mr. R.V. Bansode, Advocate for original Complainants in both matters
Mr.P.A. Pol, APP for the State.

CORAM : B.H. MARLAPALLE,J.

3RD AUGUST 2007.

P.C. :-

. These applications have brought in question the order dated 15-6-2007 passed by the learned District and Sessions Judge, Thane transferring sessions case no. 40 of 2006 from the Court of learned 3rd Adhoc Addl. Sessions Judge to the Court of learned District Judge-2 at Thane. It was submitted that the said order was passed without there being an application under section 408 of Cr. P.C.

2. Record and proceedings was called from the Sessions Court at Thane pertaining to the transfer application and it shows that the original Complainant Smt. Gangabai Govind Jadhav had addressed a letter dated 5-5-2007 as noted in the earlier order dated 17-7-2007. It was submitted on behalf of the original complainant that the impugned transfer order was passed on the said letter. But the record and proceedings does not support this contention and on the other hand the impugned transfer order has been passed on an anonymous complaint addressed to the learned Principal District and Sessions Judge at Thane. On the envelope in which the said anonymous complaint was forwarded to the Principal District & Sessions Judge Thane, the sender's name was shown as Shri Prakash Burungle, Lokmanya nagar, Room no. 4, Thane. Notice was issued to the said Shri Prakash Burungle and finally it was revealed that it was a fictitious name and inspite of the same the learned Principal District and Sessions Judge proceeded to pass the impugned order. I think it appropriate to re-produce the last 2 paras of the said order.

"Independently, I have perused the record

of the case to see whether any person by this name is concerned with the case. It, however, appears that his name does not appear anywhere in the case. He is neither any witness, injured or panch in this case. The record, therefore, does not disclose his connection with the case.

Since the allegations are made of settlement with the accused and also that the APP has also taken money, it was not possible nor could it be of no use to call the APP or the advocate for the accused to record their statement. There is, therefore, no material to establish these allegations. On the other hand, with effect from 4.6.2007 Shri G.D. Shirwadkar has been posted in the Second Court from the Third Court of Ad-hoc District Judge and Addl. Sessions Judge, Thane. He has also not taken summer vacation. Ofcourse, these facts do not decide anything conclusively.

In my opinion, therefore, though there is no material on record to establish the charges leveled against the presiding officer or the APP Smt. Phad, it cannot overlooked that if the case remains with Shri Shirwadkar and ultimately it ends in acquittal of some of the accused and conviction of some other accused as alleged, there is likelihood of another complaint. If it continues to remain with Shri Shirwadkar it may lead to more complications. It is, therefore, necessary to see that no such complications arise hereafter and also in the interest of the Presiding Officer himself that the case be transferred to some other court. Justice should not only be done but it should also seem to have been done. If there is slightest finger of accusation, then to uphold the dignity of the institution at least such step is required to be taken."

3. It is submitted across the bar that when the impugned order was passed, recording of evidence was concluded and the sessions case was adjourned from time to time for the learned APP to commence his arguments. Chapter XXXI of Cr.P.C. deals with transfer of criminal cases and Sections 408, 409 and 412 are relevant to be considered in this case. As per Section 408 whenever it is made to appear to a Sessions Judge that an order of transfer is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division by acting either on the report of the lower Court or on the application of the party interested or on his own. At the same time sub-section (3), (4), (5), (6), (7) & (9) of Section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) of Section 407, except for an order to be made under sub-section (1) of Section 408. As per Section 409(2) the powers of transfer of cases under Section 408 be exercised at any time before the trial of the case is commenced before the Addl. Sessions Judge and Section 412 states that the Sessions Judge making an order under Section 408, 409 shall record his reasons for

making such an order.

4. In the instant case as recorded earlier there was no application for transfer filed by either the defence or the prosecution and neither the original Complainant Smt. Gangubai had moved such an application notwithstanding the fact whether she has such a right. An anonymous letter is the basis for the learned Principal District and Sessions Judge to exercise his powers on his own but even the exercise of powers under Section 408 is circumscribed by the provisions of Section 409 and 412. Once the trial had commenced, the learned Principal District and Sessions Judge could not exercise the powers under Section 408 of Cr.P.C. and thus he acted without jurisdiction in the instant case.

5. In addition a Division Bench of this Court in the case of **Daulatrao Dashrath Dhonde Vs. State of Maharashtra reported in 2002 ALL MR (Cri) 1370** stated inter alia as under, on the powers of the learned Sessions Judge under section 408 and 409 of Cr.P.C.

"So far as judicial powers are concerned,

the Sessions Judge is not superior to the Additional Sessions Judge. The Sessions Judge has got the administrative powers to allot or assign the work to the different Additional Sessions Judges working with him. The administrative power of assignment of work can be exercised by the Sessions Judge until the Additional Sessions Judges commence hearing of the case. Once the case allotted to a particular Additional Sessions Judge is partly heard by that Judge, the Sessions Judge cannot have the power to withdraw the case from him, because so far as the judicial powers are concerned, both are equal. In such cases, the High Court has got the power to withdraw the case as the High Court is undoubtedly judicially superior Court."

6. On perusal of the record and proceedings and the reasoning set out in the impugned order I must observe that the learned Principal District and Sessions Judge fell in gross errors to pass the impugned order on the

basis of the anonymous complaint and that too when the trial had already commenced in the sessions case no. 40/2006. The impugned order was most uncalled for and it is a case of gross misuse of powers under section 408 of Cr. P.C.

7. In the result, these applications succeed and the same are hereby allowed. The impugned order of transfer dated 15-6-2007 is hereby quashed and set aside.

8. I deem it appropriate to place a copy of this order before the Administrative Committee of Judges presided over by Hon'ble the Chief Justice and I direct the Registrar (Judicial) accordingly.

9. For the benefit of the original Complainant it is clarified that this order will not come in her way to exercise her legal rights, if any.

(B.H.MARLAPALLE,J)